IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-1019

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF AWTREY C. GAUDET, SR.,

Appellees

VS.

SEA-LAND SERVICES, INC.,

Appellant

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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MAY IT PLEASE THE COURT:

Petitioner, Sea-Land Services, Inc., requests that a rehearing be granted in this matter.

The Court not only changes the law drastically in the area of recovery for wrongful death, but also in the area of finality of judgments. Reconsideration should be given to the Court's decision because it affects not only the consistency and quality of the jurisprudence it has

promulgated, but the general welfare of the public as well.

The Court's decision sweeps away those traditional safeguards to which litigants may look to provide stability and finality in their disputes. The following anomalies are presented to both plaintiff and defendant alike:

1) The defendant is exposed to further litigation even though a plaintiff has executed a final release containing language to the effect that he is releasing his claim for all future damages which his "heirs and assigns may have by reason of his death".

2) A judgment of a court of competent jurisdiction granting to plaintiff, during his lifetime, damages for personal injury is not final and the damage question may be reopened following the death of the plaintiff by his survivors.

3) Should plaintiff sustain a maritime personal injury and fail to either settle or litigate the matter, there is no prohibition under the majority's opinion for his widow or survivors coming into court eight or ten or twenty years later following his death and instituting suit for damages alleging that the death was caused by the injury many years previously.

4) The safeguards provided to litigants in the Mellon (277 U.S. 335) and Flynn, (283 U.S. 53) cases ,

have been eliminated and now litigants have been set drift upon the sea of uncertainty and now the occurrence of death is considered as a separate tort which gives rise to a separate cause of action.

The Court was unaware of the progeny which its decision will foster. Justice Holmes stated in the Flynn case on behalf of a unanimous court that an action for wrongful death is "derivative and dependent upon the continuance of a right in the injured employee at the time of his death." (283 U.S. at p. 56). The Court states now that the wrongful death action is not derivative but exists sua sponte without being supported by or contiguous to the tort which allegedly caused it. The Court's opinion in effect gives the widow and survivors of every person who dies after having been injured upon navigable waters the right to institute suit alleging that said death was caused by the injury upon navigable waters no matter whether settlement or judgment had ever intervened and irrespective of the time lapse involved.

In view of the current desire of the federal judiciary system to expedite the handling of cases and to speed up the disposition of matters on appeal, the Court can now expect a veritable deluge of cases with appeals, rehearings, remands and retrials spawned by this opinion. The judicial system and expeditious handling of suits will certainly suffer.

The desire of the court to guarantee to the litigants finality and some sense of security in the governing of their affairs has been swept away and now rather than being guided into more placid waters, litigants

now have been set adrift upon the sea of uncertainty.

Although a dissent is not evidence of a wrong by the majority, justice requires that the dissent be carefully scrutinized to see if an error has been made by the majority.

Although petitioner included in his original petition for writs questions concerning proper damages to be awarded in a maritime death claim, this factor was not dealt with by the Fifth Circuit in its opinion. The primary issue before the Fifth Circuit was whether or not there was a right of action on behalf of the widow in light of the fact that the decedent had already brough his claim to judgment prior to his death. The Court stated in Moragne that it would rely upon the "sifting process" of the Distri and Circuit Courts to develop a body of law consistent with the principals enunciated in Moragne. This sifting process began immediately and had resulted, we submit, in sound and rational conclusions. In fact there was no conflict in the Circuits with regard to the type of damages to be awarded in post-Moragne cases. Why then did the Court take it upon itself to "intrude" into the sifting process which was not encountering any difficulty, mishap or snag. What the Court has done is to reject its own language in Moragne which called upon the District and Circuit Courts to formulate a body of law consistent with the right of recovery for wrongful death under, General Maritime Law, the state law and federal statutes:

Petitioner's original petition for writs, it was supposed, was granted due to the erroneous decision of the Fifth Circuit in deciding their case contrary to the

established law in the Flynn and Mellon cases. There was no conflict between the Circuits in any of the post-Moragne cases with regard to awardable damages to widows and survivors.

We direct the Court's attention to the closing remarks of the Fifth Circuit Court of Appeals speaking through Judge Godbold in the case of petition of M/V ELAINE JONES, 480 F.2d 11 (1973) in discussing the sifting process contemplated by Moragne:

> "The methodology for the 'further sifting' contemplated by Moragne has thus been firmly established in this Circuit. In shaping the new remedy we look first to existing maritime law, to which Moragne has allowed access in a death action. We next examine the remedial policies indicated by Congress in the Federal Maritimes statutes. Heed to these statues will assist in ensuring that 'uniform vindication of federal policies' mandated by the Moragne Court." Page 31.
>
> We conclude that the current rationales underlying recoverability for survivor's grief damages in state death actions are too divergent and ill defined to override the policies against recoverability manifested in general maritime law and in the federal statutes. This conclusion is not based on a mandate that the Moragne recovery be identical in all respects to general maritime law and to federal maritime statutes. Absolute uniformity is neither required nor desirable. Necessarily variations in proof, procedure,

beneficiaries, and damages will affect the nature of recovery under various remedies and will cause the mariner to join alternative claims whenever possible.[24] Our conclusion results rather from measuring the federal policies manifested in the federal statutes and general maritime law against those policies expressed in the state experience and relevant to maritime problems. This is the methodology we perceive to be compelled by Moragne and followed by this court in at least four post-Moragne cases. See Futch v. Midland Enterprises, Inc., 471 F.2d 1195 (5th Cir. 1973) (No. 72-2900); Gaudet v. Sea-Land Servs., Inc., 463 F.2d 1331 (5th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F. 2d 137 (5th Cir. 1972), cert. denied, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed. 2d 218; Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970).

While not crucial to our decision, we note that other circuits that have considered the issue have uniformly denied grief damages in a general maritime action. See Greene v. Vantage S.S. Corp., 466 F.2d 159 (4th Cir. 1972); Simpson v. Knutsen, O.A.S., 444 F.2d 523 (9th Cir. 1971); In re United States Steel Corp., 436 F.2d 1256 (6th Cir.1970) cert. denied sub nom. Lamp v. United States Steel Corp., 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971). District courts have divided on the issue. Compare In re Farrel Lines, Inc., 339 F. Supp. 91 (E.D.La.1971); In re Sincere Navigation Corp., supra, with Mungin v. Calmar S.S. Corp.,

342 F.Supp. 479 (D.Md.1972); Curry v. United States, 338 F.Supp. 1219 (N.D.Cal.1971); Green v. Ross, 338 F.Supp. 365 (S.D.Fla.1972). Opinion p. 33, 34 (Emphasis supplied)

We would also point the Court's attention to the case of Petition of U. S. Steel Corporation, 436 F.2d 1256, (Sixth Cir.1970), a post-Moragne decision which refused to grant damages for non pecuniary loss:

> Recognition of a right of recovery for wrongful death under the general maritime law strongly dictates that in order to promote the uniformity and supremacy of the maritime law (See Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56 (1961); Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), the measure of recovery must be governed by the principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law (Igneri v. Cie de Transports Oceaniques, supra; Simpson v. Knut Knutsen, O.A.S., supra Valitutto v. D/S I/D Garonne, supra) and those recoverable under state law (Montgomery v. Stephan, supra). Accordingly, upon the remand hereinafter ordered, the District Court is instructed not to allow damages to any claimants with respect to either loss of consortium to the widows or loss of love, companionship and guidance to the adult emancipated children.

The Court in the majority opinion on page 12, footnote 14, cited petition of Canal Barge Company, 323 F. Supp. 805 (1971) for the proposition that non pecuniary damages had been allowed in post-Moragne maritime wrongful death action. The Court was incorrect in citing that case for that proposition as the case did not so hold. The District Judge refused to allow damages for non pecuniary loss but stated that if the Circuit Court should order him to do so that he would grant stated amounts to the widow and children. The Circuit Court upheld the District Court in refusing to make an award for loss of love and affection, and stated:

> Relying by analogy on the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act, 46 U.S.C. §§ 761-68, and rejecting as discordant with admiralty's quest for uniformity the suggestion that state law be, borrowed, the District Court concluded that damages for survivor's grief could not be recovered in a general maritime action for death caused by unseaworthiness. For use in the event we disagreed, the District Judge found that the decedent's family would be entitled to $60,000 for lost love and affection, divided $20,000 to the widow and $10,000 to each of the children. Mrs. Griffith contends that the court erred in refusing to award these additional damages. We agree that survivor's grief damages are not recoverable in a general maritime action, although for somewhat different reasons than those given by the court below. P. 29, 30 (Emphasis supplied)

Although it is true that some of the Courts have "permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death", this is a far cry from allowing the damages allowed by the Court for non pecuniary loss. Value of services is a pecuniary loss which can be calculated by the trier of fact. Loss of love, companionship and affection and consortium are not. See petition of U. S. Steel Corporation cited Supra.

We submit that the dissenting opinion bears careful examination. The minority seems to express in the dissent not only a disagreement with the opinion of the majority, but a concern for the validity of the opinion itself in law. The dissent seems to sound a warning to the majority that an error of far reaching consequence has been committed which should be corrected before irreparable damage occurs to litigants in pending and in future cases.

Consider the following language found in the dissent:

> "Disregarding the source of law endorsed by Moragne, as well as the concern for uniformity expressed in that opinion, the Court has fashioned a new substantive right of recovery in conflict with 'accepted Maritime Law' and a new body of law with regard to the elements of damages recoverable in admiralty wrongful death actions. In my view, these unprecedented extensions of admiralty law exhibit little deference for "stare decisis" or, indeed, for enunciated congressional policy. I also believe these new doctrines are unsound as a matter

of principal, will create difficulty and confusion in the litigation of admiralty cases and are very likely to result in duplicative recoveries." (Page 2, 3).

* * *

"An uninterrupted line of FELA and Jones Act cases going back a half century holds that if the decedent reduces his claim to settlement or judgment prior to his death, or otherwise extinguishes his right to pursue the claim, no subsequent wrongful death action may be brought." (Page 4).

* * *

"But the lack of uniformity produced by the majority's holding should be evident." (Page 7).

* * *

"Aside from the disunity of the law of admiralty inherent in its opinion, I fail to see how the Court can square its sweeping approach with Moragne's reliance on an admonition to draw by analogy from the federal statutes . . . . .Moragne envisioned a process of accommodation with those statutes, not their abrupt and near total forced obsolescence. (Page 7 & 8).

* * *

"Under the great majority of those statutes [wrongful death statutes], whether a survival or true death act character, Mrs. Gaudet's cause

of action would have been foreclosed by her husband's recovery." (Page 8).

* * *

"The Restatement of Torts is also in direct conflict with the position taken by the Court." (Page 9).

* * *

"...I think it important to note that the Court's holding that loss of society may be recovered is a clear example of the majority's repudiation of the congressional purposes expressed in the two Federal Maritime Wrongful Death statutes". (Page 11).

* * *

"The highly conceptualized nature of the parsing of catagories of damages undertaken by the Court suggest how unlikely it is that the majority's theoretical distinctions will be meaningful in practice. And control by way of appellate review of the injustices that are bound to occure will be, practically speaking, an impossible task." (Page 15).

* * *

"The Gaudet family may well then receive substantially more than just compensation for its injuries. One expression of jury sympathy is common place, despite its conflict with the damaged principals that in theory

control. But certainly two opportunities for jury sentiment crosses the line between benignity and bonanza and should not be sanctioned." (Page 15 & 16).

* * *

The Court has also ignored the laws normal regard for an end to duplicative litigation arising from the same transaction." (Pages 16 & 17).

* * *

"There should be strong reasons of policy to justify such repetitive suits and to impose on petitioner the attendant doubling of litigation expenses." (Page 18).

* * *

"In reaching these results, the majority of opinion has discredited, if not in substance overruled, the unaminous decisions of the Court in the Melon and Flynn cases." (Page 18)

Just as Powell concludes the dissent with the following caveat:

"And, unlike the opinion in Moragne, the majority has not provided, in my view, sound reasons of precedent or policy for overturning the rule.: (Page 19).

The dissent also correctly pointed out that recovery for unseaworthiness can be harsh due to the application of strict liability principles.

"The maritime concept of unseaworthiness is not based on fault. The doctrine has evolved into a judicially-created form of strict liability. When the law imposes absolute liability, it often restricts recovery to damages for those injuries that are clearly ascertainable and susceptible to monetary compensation.....This reflects the impossibility of deterrence and the inappropriateness of punishment in many cases where liability is absolute. The Court has broken with that wise rule of social policy in this case. Dissent page 17.

The Fifth Circuit in the Canal Barge case (supra) thoroughly discussed reasons for state statutes allowing recovery for non-pecuniary losses.

"On the other hand, mental grief damages have often been awarded under state death acts for land-based torts, but the differing rationales and factual circumstances underlying allowance of such recovery make difficult the extraction of policies applicable in a maritime context. For example, some courts have apparently upheld survivor's grief damages on the theory that punitive damages are recoverable under the state's wrongful death statute. See, e.g., Sloss-Sheffield Steel & Iron Co. v. Drane, 160 F.780 (5th Cir. 1908); Leahy v. Morgan, 275 F.Supp. 424 (N.D. Iowa 1967). California recognizes psychic injury as an element of damages, but restricts recovery to parents who actually witness the negligently inflicted death of their minor child.

See Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968), overruling Amaya v. Home Ice, Fuel & Supply Co., 59 Cal.2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963). Occasionally liberal recovery under state wrongful death acts has been permitted without distinguishing between tangible loss of services and intangible grief. See, e.g., Louisville & N.R. Co. v. Whisenant, 214 Miss. 421, 58 So. 2d 908 (1952) Several state wrongful death statutes allowing recovery for survivor's grief limit the amount recoverable, e.g., W.Va. Code Ann. § 55-7-6, and at least one limits grief recovery to spouses and parents, Md. Code Ann. art. 67, § 4 (Supp. 1972). And one court has upheld survivor's grief damages while denying damages for pecuniary loss. See Gregg v. Coleman, 235 F.Supp. 237 (E.D.S.C. 1964).

Thus, the combining of the strict liability rule under unseaworthiness and the recovery for punitive damages under the state wrongful death acts is a windfall indeed to the plaintiff, but one which has no support or parallel or precedent in the annals of modern jurisprudence. To allow such a result to stand would result in irreparable damage to the judicial system under which litigants must seek the impartial administration of justice.

After careful analysis of the background of the HARRISBURG and the reasons for its adoption into the American legal system, the Moragne court said:

> "The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age." 26 L.Ed. 2d. 348

Hopefully, the majority will grant a rehearing in this matter and refuse to give the "unjustifiable anomaly" resulting from the majority opinion any such blessing.

Respectfully submitted,

McCLENDON, GREENLAND
& DENKMAN

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PROOF OF SERVICE

I, Stuart A. McClendon, attorney for defendant and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing Petition for Rehearing on:

GEORGE W. REESE, Attorney
627 National Bank of Commerce
New Orleans, Louisiana 70112

by mailing a copy thereof, postage prepaid addressed to his respective office, this 13th day of February, 1974.

CERTIFICATE OF GOOD FAITH

This is to certify that the foregoing Petition for Rehearing is being filed in good faith and not for the purpose of delay.

STUART A. McCLENDON